

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6116

To be Argued by
LLOYD CONSTANTINE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

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VERONICA JONES and ROBERT JONES, on :
behalf of themselves and all other :
persons similarly situated, :

Plaintiffs-Appellants, :

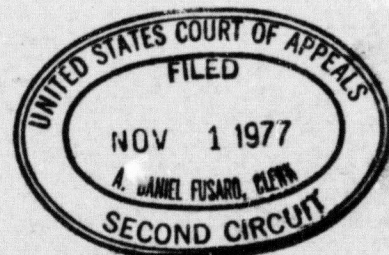
-against- :

JOSEPH A. CALIFANO, Secretary of Health, :
Education and Welfare; :

BERNICE L. BERNSTEIN, Director Region II: :
Department of Health, Education and :
Welfare; and :

JOSEPH J. KELLY, Commissioner Social :
Security Administration, New York :
Region, :

Defendants-Appellees. :



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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs submit this brief in reply to the
Defendants' brief.

POINT I

THE MERITS

42 USC §602(2)(24) states:

if an individual is receiving benefits under sub-chapter XVI [SSI] of this chapter, then for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this sub-chapter [AFDC] and his income and resources shall not be counted as income and resources of a family under this sub-chapter.

Defendants contend that §602(a)(24) operates prospectively and has no retroactive application. In response, plaintiffs rely on the plain meaning of the section which states that it is effective "for the period for which such benefits [SSI] are received." (emphasis supplied). Sub-chapter XVI requires that the SSI entitlement be paid retroactive to the date of application. 42 USC §1382(c)(2). The payment of these retroactive benefits, just as the payment of SSI benefits prospectively, invokes the operation of §602(a)(24). During the retroactive period, i.e., January 1976 to June 1976, Veronica Jones and her two children received \$348.50 monthly in AFDC payments. When SSA pays Ms. Jones her retroactive entitlement, they must obey §602(a)(24), because January 1976 to June 1976 is obviously a "period for which such benefits [SSI] are received." §602(a)(24) explicitly requires that Ms. Jones not be regarded as a member of her children's AFDC

family for determining their AFDC benefits. The monthly payment for the children's AFDC family for this period would have been \$291.00. (Ms. Jones' children receive this sum now that she has actually been removed from the AFDC budget.) The remaining \$57.50 is plaintiff's attributable income, that is, the amount of AFDC her presence actually accounted for.

Stated differently, plaintiff's family must receive the same total of SSI and AFDC when payment is made retroactively as would have been made prospectively. To argue otherwise, as defendants do, makes §602(a)(24), as well as the provisions mandating date of application entitlement to SSI benefits totally meaningless. §602(a)(24) governs the relationship between AFDC and SSI grants in a household where there are beneficiaries of both programs. Its purpose is to assure that the SSI recipient receives the full benefit of the statutorily fixed grant by assuring that the remaining family's AFDC grant will not be reduced by considering the SSI grant as income available to them.

In three instances over a period of seventeen months, plaintiffs' counsel have advanced this identical statutory argument before SSA's administrative tribunals. In all of these instances, plaintiffs' contentions herein have been completely adopted and defendants' assertions rejected. In re Luz Gonzalez, Compl. Ex. D, R-41, In re Irma R, Compl. Ex. E, R-44, In re Veronica Jones, R-86. Defendants dismiss this

consistent line of administrative adjudication, as they must, by stating that the Secretary is not bound to adopt the results as his rule in the administration of the SSI program. Defendants do not even attempt to attack the rationale of these, their own agency's, decisions.

The precedents cited by defendants state only that an administrative agency is not bound to slavishly follow the reasoning of its prior administrative adjudications. However, this principle has nothing whatsoever to do with the situation which obtains in this case. This Court is confronted with an agency at war with itself. The program is administered under the challenged "per-capita method", but each time an individual challenges this procedure, the Secretary's own Appeals Council rules this method illegal. Thus in the Court below, the defendants, as here, argued that they were not bound by the previous Gonzalez and Irma R Appeals Council decisions. However, one month after Judge Duffy dismissed plaintiffs' complaint, the Secretary's own Bureau of Hearings and Appeals once again held the defendants' "per-capita method" illegal in In re Veronica Jones, supra. The program is being administered under two separate standards, one for persons who challenge the procedure at an advanced stage of administrative review, and one for the great mass of people, i.e., plaintiffs' class, who unknowingly accept the deficient payments made to them. It must be understood that in Gonzalez,

Irma R., and Veronica Jones, the administrative decisions represented the Secretary's final decision. Defendants' strategy is obvious. By allowing relief to be granted to the few who adjudicate, they can argue that exhaustion is not futile and deter the Courts from reaching the merits. Defendants cannot cite the Court to any precedent which allows an agency to administer a program in one manner for claimants who adjudicate their claims and in an other manner for those who do not, for indeed there is no such precedent. Defendants are merely playing a cruel and cynical game with plaintiff's class, and heretofore have had the indulgence and sanction of the Courts in this course of conduct.

Defendants', who did not even attempt to defend this suit on the merits in the Court below (Dec. p. 8, R-8) now contrive the argument that SSA's policy is necessary to accomodate the State's role in administering the AFDC program. Defendants cite Dandridge v. Williams, 397 U.S. 471 (1970) and related cases which interpret the States broad discretion in administering their AFDC programs. It must be apparent to the Court that this case has nothing whatsoever to do with the manner in which New York administers its AFDC funds, and the relief plaintiffs seek would not have any effect on the State's administration of the AFDC program. Sutton v. Califano, 77 Civ. 4223 (S.D.N.Y.) now pending before Judge Haight is identical to this case except for the joinder of New York's

of Social Services, submitted in Sutton states:

Specifically, with respect to the matters involved in the instant action except for advising the SSA as to the total amount of AFDC benefits received by a household during the time an SSI application was pending, New York State does not in any way participate in the process by which SSA determines or calculates the amount of retroactive SSI benefits (including the State portion thereof) that may be due to any individual person. New York has not at any time advised or instructed SSA as to the manner or method to be employed by SSA in making any such calculation. Nor is there any statute, regulation, or agreement that empowers or requires New York to do so. The determination and calculation of the proper amount of any retroactive SSI award is done solely by SSA in accordance with its own rules and regulations. (Cortright affidavit ¶ 7).

Although New York neither has the power, the authority, nor the intention to dictate SSA's policy in these matters, defendants are seeking to shift the blame to the State in order to produce a justification for an irrational and illegal policy. The dispute between defendants and the State is of no consequence to plaintiffs who seek an injunction against SSA's use of the per-capita method, regardless of its philosophical genesis.

POINT II

CLASS ACTION AND MOOTNESS

Defendants do not dispute that plaintiffs' purported class meets all the requirements for class action status under Rule 23(a), (b) (2) of the Federal Rules of Civil Procedure*. Instead defendants rely on an inapposite holding in Weinberger v. Salfi, 422 U.S. 749 (1975) for their contention that class certification is inappropriate in this case.

In Weinberger v. Salfi, supra, the Supreme Court stated:

As to class members, however, the complaint is deficient in that it contains no allegations that they have even filed an application with the Secretary, much less that he has rendered any decision, final or otherwise, review of which is sought. The class thus cannot satisfy the requirements for jurisdiction under Section 405(g). 422 U.S. at 764.

Nothing in Salfi suggests that class action status may be withheld in all section 405(g) cases, only that the Salfi class, comprised of individuals who had not even filed applications, could not obtain judicial review under section 405(g). Defendants choose to ignore that plaintiffs' class

*The class allegations set forth in plaintiffs' statement pursuant to General Rule 9(g) of the Southern District were not disputed by defendants in the Court below and are deemed admitted in accordance with that rule. See plaintiffs' 9(g) statement ¶'s 21, 23, R-81.

is comprised of individuals who have all filed applications for SSI, and that members of the more numerous sub-class have all been determined eligible and received adverse determinations from defendants on the precise issue which is the subject of this litigation.

Whether this Court will determine that Veronica Jones had pursued her claim sufficiently in this factual context to invoke jurisdiction under section 405(g) is a separate matter fully discussed in plaintiffs' previously submitted brief.

Defendants' assertion that class certification will place an unnecessary procedural burden on the Courts is ludicrous. This Court need only examine SSA's reprehensible past conduct concerning these issues (see plaintiffs' Brief page 8-13) to see the absolute necessity for class injunctive relief. By defying its own consistent line of administrative adjudication, i.e., In re Luz Gonzalez, supra, In re Irma R, supra, In re Veronica Jones, supra, SSA has placed the burden of three unnecessary lawsuits on the Courts of this Circuit.

Because of defendants' documented practice of mootting the claims of each named litigant, a class certification which reverts back to the filing of the class motion is necessary to prevent a live dispute from evading review for reasons of mootness. Contrary to defendants' assertions, this case presents the exact abuse that this Court was concerned with in White v. Mathews, No. 77-6015, slip op. 4715 (2d Cir.

July 18, 1977) when it stated:

Refusing to do so [allow class certification to revert back] would mean that SSA could avoid judicial scrutiny of its procedures by the simple expedient of granting hearings to plaintiffs who seek but have not yet obtained class certification. [Citations omitted]. We do not suggest that this occurred here, be [sic] we must take notice of the "reality" of that possibility in the future. Slip opinion at 4723.

This Court's concern was prophetic, as the facts of this case attest. SSA has rendered a decision favorable to each named litigant while continuing to administer the program in a manner antagonistic to these very decisions. After waiting more than eight months for a hearing, SSA settled the claim of plaintiff Jones just eight days after Notice of Appeal was filed in this case. Furthermore, SSA acted in response to Judge Duffy's explicit threat to vacate his dismissal and decide the merits if speedy administrative action was not forthcoming. Dec. P. 8, R-8. Defendants' assertion that mootness occurred because of plaintiffs' independent action is erroneous and irrelevant. First, it was SSA's own administrative decision which resolved the named plaintiffs' individual claims. Second, had plaintiffs chosen not to pursue SSA's administrative review, defendants would have argued that plaintiffs could not invoke 42 USC §405(g) jurisdiction because they had failed to exhaust the available

administrative remedies.

Defendants are asking this Court to accept the proposition that as long as SSA is willing to provide relief to individual litigants, the Courts are powerless to prevent the agency from administering the SSI program for other claimants in a manner which is both contrary to its own adjudications and inconsistent with the Social Security Act. This Court should put an end to this administrative travesty of more than two years duration.

CONCLUSION

For the foregoing reasons and the reasons stated in plaintiffs' previously submitted brief, the judgment of the district court dismissing plaintiffs' complaint and denying their motion for class certification should be reversed in all respects and remanded for entry of a judgment granting plaintiffs class certification, summary judgment, and declaratory and injunctive relief, consistent with plaintiffs' prayer for relief.

Dated: October 31, 1977
Brooklyn, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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VERONICA JONES, et. al.,

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-against-

AFFIDAVIT OF SERVICE

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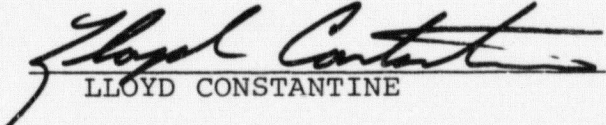
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STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

LLOYD CONSTANTINE, being duly sworn, deposes and
says:

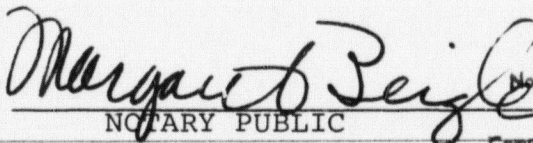
I am a member of the bar of this Court and co-counsel
for plaintiffs-appellants in the above styled action. On
the 31st day of October, 1977, I served counsel for all the
defendants-appellees with two copies of Plaintiffs' Reply
Brief. Service was made by first class pre-paid United
States Mail at the address which appears below:

AUSA NATHANIEL GERBER
St. Andrews Plaza
New York, New York 10007


LLOYD CONSTANTINE

Sworn to before me this

31st day of October, 1977


NOTARY PUBLIC
MARGARET ZEIGLER
Notary Public, State of New York
No. 24-4382675
Qualified in Kings County
Commission expires March 30, 1979

